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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 558

CHARLES CLOSE,
PETITIONER,
v.
JOHN W. LEDERLE, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the court of appeals (Pet. 13-16) is reported at 424 F.2d 988. The opinion of the district court (Pet. 19-24) is reported at 303 F.Supp. 1109.

Jurisdiction

The judgment of the court of appeals (Pet. 17) was entered on April 28, 1970. A petition for rehearing (Pet. 26-

37) was denied by order of the court of appeals entered May 22, 1970 (Pet. 18). The petition for writ of certiorari was filed on August 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Having received permission to have an exhibition of his art works hung in a public corridor of the Student Union of the University of Massachusetts in January of 1967, did petitioner thereby acquire a constitutionally protected right under the facts of this case to have his exhibition continued for the period of time originally allotted to him?

Statutory Provision

Massachusetts General Laws, chapter 75, § 1 provides, in pertinent part:

> "* * * In addition to the authority, responsibility, powers and duties specifically conferred by this chapter, the board of trustees [of the University of Massachusetts] shall have all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning. * * *"

Statement

In 1966, when petitioner was an art instructor at the University of Massachusetts (he has since left the employment of the University), he arranged for an exhibit of his art works on the walls of a public corridor in the student union of the University. The exhibit was scheduled pursu-

ant to informal procedures formulated by the University's Department of Art and the Student Union Arts and Music Committee and was to run from January 8 through 31, 1967. On Sunday, January 8, 1967, the exhibit was mounted on the walls of the corridor, which served as a passageway to dining rooms and the ballroom of the student union. The corridor also provided access to lavatories in that building, and it was used by many members of the academic community and the general public, including children.

Petitioner's exhibition was controversial and provoked certain complaints from faculty, students and others. It contained pictures of partially nude males, nude females, pictures, characterized as depicting "campus life" with captions including "I'm only 12 and already my mother's lover wants me" and "I am the only virgin in my school", and a three dimensional construction of a skeleton, with the only flesh showing being the penis. Other works, however, were not controversial.

After the exhibit was mounted, one of the paintings was stolen, and a call was received threatening harm to the exhibit. Accordingly, a security guard was appointed to watch the exhibit, and members of the University administration began meeting concerning the exhibit. On Thursday, January 12, 1967, there were several meetings with the President, Provost, Secretary, Director of the Student Union and two Deans of the University in attendance. After a full discussion of the facts and a consideration of the exhibit, a decision was reached that the corridor of the student union was an inappropriate place for the exhibit. It was therefore decided to take the exhibit down forthwith, and petitioner's works were removed and returned to him.

Petitioner then commenced a civil action in the United States District Court for the District of Massachusetts, alleging that he had been deprived of First and Fourteenth

Amendment rights by virtue of the removal of his exhibit. The defendants (respondents here) moved to dismiss (1) for failure to join an indispensable party and (2) for failure to state a claim upon which relief could be granted. The complaint was amended, and, after hearing, the motion to dismiss was denied. After a trial without jury, the district court judge filed an opinion (Pet. 19-24) in which he ordered judgment for the petitioner.

On appeal, the court of appeals reversed. The court determined that there was nothing in the record of the case to indicate that petitioner's "art was seeking to express political or social thought" and that petitioner's constitutional interest was therefore minimal. The court concluded that the respondents were entitled to consider the use of the corridor, and that their action in removing the exhibit was justified (Pet. 14-15).

Argument

The petition presents no substantial question warranting further review by this Court. There is no conflict between circuits, and the decision below — which is based on a careful analysis of the facts and the question of law presented — is correct.

As he has persisted in doing throughout this litigation, petitioner again misconceives and misstates the nature of this case. The question presented to the court of appeals was whether, under the particular facts of this case, petitioner acquired a constitutional right to have his art exhibit maintained on the walls of the student union corridor. As the court of appeals noted, the district court "refused autoptic profference of the exhibition". Despite the district court's failure to consider the nature of the exhibit in concert with its location, the court of appeals was quick to see

on a review of the entire record that this was not simply a case of "free speech." The respondents have never contended that petitioner is not free to paint whatever he wants; their position (and the position of the court of appeals) is that he was not free to have his paintings continue to hang in the student union of the University of Massachusetts given the facts of the case.

Thus, in respondents' view, it is simply an academic exercise to reargue traditional First Amendment concepts. As we argued in the court of appeals, it is not sufficient to cite general principles in an attempt to resolve a particular problem based on peculiar facts. *Whitney* v. *State Tax Commission*, 309 U.S. 530, 542.

The court of appeals did not, as petitioner suggests, hold that "political ideas are deserving of greater protection than social or artistic ones . . ." The opinion below can be searched in vain for any hint of such a holding. What the court did say, however, was that the cases cited by petitioner such as *Brooks* v. *Auburn University*, 296 F.Supp. 188, aff'd 412 F.2d 1171, *Dickson* v. *Sitterson*, 280 F.Supp. 486, and *Smith* v. *University of Tennessee*, 300 F.Supp. 777, are inapposite, involving, as they did, "students' rights to hear possibly unpopular speakers." (Pet. 14).

This Court has recently affirmed the right of individuals not to be "captives" everywhere they go. *Rowan* v. *United States Post Office Department*, 397 U.S. 728. We submit that the court of appeals did no more when it rejected petitioner's claim that he had a right to force the public, including children, to view his exhibit. As the court of appeals recognized, "[f]reedom of speech must recognize, at least within limits, freedom not to listen." (Pet. 16).

Secondly, the issue presented by this case is not a recurring one. It is highly unlikely that the situation which existed in January of 1967 will ever be repeated at a state

institution of higher learning in Massachusetts. And there is absolutely no basis to petitioner's assertion that "state officials will feel free to utilize vague rubrics" in future cases. (Pet. 8). Although petitioner continues to assert that he will travel from New York to Amherst, Massachusetts to reinstate his exhibit if he ultimately prevails, the question here has, due to the passage of time coupled with petitioner's resignation and the dispersal of much of the exhibit, been rendered academic if not moot.

Finally, the instant case is not at all similar to *People* v. *Cohen*, 1 Cal. App. 3rd 94, 81 Cal. Rptr. 503, forma pauperis granted and jurisdiction postponed *sub nom. Cohen* v. *California*, —— U.S. ——, 38 LW 3507 (June 22, 1970). The question there, of course, is whether Cohen's conviction for disturbing the peace was constitutional. The instant case purports to be a suit under the Federal Civil Rights Act and is not criminal. Petitioner recognizes the dissimilarity when he states that "neither vulgarity . . . nor a claim of 'political speech' is present here, ..." (Pet. 9). We submit, therefore, that petitioner's attempt to link this case with *Cohen* is simply without merit.[1]

In summary, petitioner's paintings were ordered removed by the respondents because, in the exercise of the discretion conferred upon them (see Mass. Gen'l Laws, c. 75, § 1), it was determined that the paintings were not appropriate for display after the theft of one item, telephone calls protesting the exhibit and threats of damage. There was no abuse of discretion, and no constitutional rights were affected.

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[1] Petitioner concludes his argument by asserting that the decision below was based upon issues unargued in either the district court or the court of appeals. This is not the case, as the court of appeals noted in its order denying rehearing (Pet. 18) and a review of the briefs filed below will show.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Assistant Attorney General
Attorneys for Respondents

September, 1970

CERTIORARI
DENIED
N.C.R.